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**Issue Date: 30 July 2007**

**CASE NO.: 2006-AIR-00009**

In the matter of:

**BRYAN FLOREK**
Complainant

v.

**EASTERN AIR CENTER, INCORPORATED**
Respondent

APPEARANCES:

Thomas E. Kenney, Esq., Pierce & Mandell, Boston, Massachusetts, for the Complainant

Bahig F. Bishay, pro se, Norwood, Massachusetts, for the Respondent

# RECOMMENDED DECISION AND ORDER

## I. Statement of the Case

This case arises from a claim for whistleblower protection filed by Bryan Florek ("Complainant") against his employer, Eastern Air Center, Inc. ("Respondent" or "EAC"), under the employee protection provisions of Section 519 of the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century ("AIR21" or "Act"). 49 U.S.C. § 42121. After investigation, the Occupational Safety and Health Administration ("OSHA") found the complainant to be without merit. The Complainant objected to OSHA's findings and requested a formal hearing before the Office of Administrative Law Judges ("OALJ"). A hearing was held before the undersigned Administrative Law Judge in Boston, Massachusetts on October 26 and 27, 2006, at which time all parties were afforded the opportunity to present evidence and oral argument. The Complainant appeared at the hearing represented by counsel, and the Respondent

appeared *pro se*.[1] The Hearing Transcript is referred to herein as ("TR").[2] The Complainant, Andrew Farkas, Jeffrey Adams, Leonard Carroll, Nardine Bellew, and Bahig Bishay testified at the hearing. Documentary evidence was admitted as Complainant's Exhibits ("CX") 1-15 and Respondent's Exhibits ("RX") 1-18.[3] Following the hearing, the parties submitted a letter dated October 30, 2006 stipulating the amount of unemployment compensation benefits. I have marked the letter as Joint Exhibit 1 ("JX 1") and it has been admitted. The Complainant and the Respondent have both filed briefs and the record is now closed.

## II. Stipulations and Issues Presented

The parties have stipulated to the following: (1) AIR21 applies to the present claim; (2) EAC is an air carrier within the meaning of AIR21; (3) the Complainant was employed by EAC from September of 2003 until his termination on July 18, 2004; and (4) the Complainant received a total of $6,502 in unemployment benefits for the period July 18, 2004 through January 29, 2005 following his termination. TR 7-9.

The issues in dispute are as follows: (1) whether the Complainant engaged in protected activity as defined by AIR21; (2) whether EAC was aware of the protected activity; (3) whether the Complainant suffered an adverse employment action; (4) whether the Complainant's protected activity was a contributing factor in the adverse employment action; (5) whether EAC would have taken the same action in the absence of protected activity; and (6) the appropriate remedy, if any.

## III. Findings of Fact and Conclusions of Law

### A. Complainant's Testimony

The Complainant attended Dedham High School and received his GED in 1997. TR 78. In high school he took classes for carpentry and masonry. TR 78-79. In 2000, the Complainant worked for McGuire Equipment in Hyde Park, Massachusetts for seven or eight months. TR 79-80. He was a full-time welder and was paid $15 per hour. TR 80. In 2001, the Complainant worked for National Water Main in Hyde Park, Massachusetts. *Id.* He performed welding and mechanical work for about seven or eight months, and was paid $18 per hour. *Id.* His next position was at Neptune Marine in South Boston, Massachusetts. TR 81. He worked there from approximately August to November of 2002. *Id.* He was paid $18 per hour. TR 82. His next position was with Boston Steel Corporation, where he was a foreman overseeing four men in a

[1] Mr. Bishay acted as EAC's representative at the hearing.

[2] The hearing was held over two days. The transcript for the first day, October 26, 2006, is in one volume and the transcript of the proceedings on the second day, October 27, 2006, is in a second volume. The page references for the index to the transcript for the second day of the hearing, October 27, 2006, are not consistent with the page numbers in the transcript for that day. The actual transcript pages for October 27 continue the page numbering sequence from the previous day's proceedings. However, the page references for the index page for the October 27, 2006 transcript begin the number sequence anew making the index to the transcript for October 27 unusable.

[3] Respondent's exhibits RX 19-21 were identified but not admitted. TR 400-406.

small welding shop. TR 81. He was paid $20 per hour, and he worked there for five months finishing in 2002. *Id.*

The Complainant began to work with EAC on September 16, 2003 as a line crewman. TR 82; RX-13. EAC is certified by the Federal Aviation Administration ("FAA") as an air carrier to provide on-demand air charter services. RX-6 at 2. EAC operates at Norwood Airport in Norwood, Massachusetts. *Id.* Some of the services offered by EAC are aircraft charter service, aircraft repair service, aircraft sales, aircraft storage, and aircraft fuel. *Id.* EAC also operates the Norwood Airport Terminal Building, the Avis Rent A Car agency, Aircraft Sales and Management, as well as providing ramp services. *Id.*

As a line crewman at EAC, the Complainant's duties "were to fuel the aircraft …as well as prepare aircraft for flight." TR 82. To prepare the aircraft for flight, the Complainant would pull "it out of the hangar, [bring] it into the main ramp where it would be boarded, and . . . [go] through the aircraft and [remove] trash from a prior flight. Gum wrappers or cups, things of that nature." TR 83. The Complainant was paid $10 per hour, and he typically worked forty hours per week. TR 83; RX-7. During 2003, the Complainant's gross earnings with EAC were $6,617.25 and during 2004, the Complainant's gross earnings with EAC were $13,149.20. CX-4; RX-7.

The Complainant was trained by Paul Spearin, EAC's line crew supervisor, on how to wash an aircraft exterior, wipe down the interior of an aircraft, and dump all the trash, including gum wrappers, cups, and meals passengers may have left behind. TR 90, 173-174. EAC made gloves available either for fueling an aircraft or cleaning an aircraft. TR 175. Prior to July 2004, the Complainant was not trained by EAC to properly clean up human waste, human vomit, or how to handle biological hazards. TR 186.

On Sunday, July 4, 2004, the Complainant was working from 7 a.m. to 8 p.m. TR 85, 87. He was preparing "November 228 Charlie Charlie" ("N228CC"), a corporate jet, for a flight scheduled to depart at noon. TR 85-86. Ten minutes before noon the Complainant entered the hanger to assist in moving the plane to the boarding area. TR 86. The Complainant was working with Jeff Burke. *Id.* The Complainant testified that "[o]n the weekends, [Burke] was pretty much in charge of me. I would call him my supervisor. . . . [H]e would direct us on tasks, and generally there was no upper management around, so he would more or less run the show." TR 87. When the Complainant entered the hanger he discovered the carpet for N228CC lying on the floor of the hanger. TR 86-87. The Complainant had never seen an aircraft's carpet lying on the floor of the hanger. TR 86. He "went over and picked it up off the floor. The door to the aircraft was closed." *Id*. Burke came along with the tug, and the Complainant hooked up the aircraft so Burke could pull it. *Id*. The Complainant asked Burke why the carpet was lying on the floor, and Burke told him that it was supposed to have been cleaned by another lineman. *Id.* Burke towed N228CC from the hanger to the boarding area, and the Complainant followed him in a golf cart with the discarded carpet on top of the golf cart. TR 88.

After N228CC was towed to the boarding area, the Complainant entered the aircraft. *Id.* As soon as he entered, he noticed the stench of vomit or urine. He discovered a bottle of Windex and some type of cleaning solution with no label. *Id.* He also noticed some used and unused

rags, and two pairs of Latex rubber gloves lying in the aircraft. *Id.* The toilet bowl on board was filled with blue wipes and the toilet was full of human feces. *Id.* At least one seat of the aircraft was stained and it smelled like urine. TR 89. The Complainant placed the cleaning materials in a plastic bag, and tried to clean the stained seat with either Windex or leather cleaner. *Id.* The Complainant asked Burke why N228CC was in that condition and Burke told him that another lineman was supposed to have cleaned the aircraft on the prior day. TR 90. The Complainant stated that after he spoke with Burke regarding the condition of N228CC, he believes that Burke informed other higher employees in the company about its condition. TR 187. The Complainant believes Burke contacted Sharon Meredith, who was in charge of Charter. TR 187-188.

The next day, July 5, 2004, the Complainant talked to Spearin, his line crew supervisor. TR 90, 188. The Complainant asked Spearin why the cleaning supplies were left in the aircraft, "especially after somebody was supposed to have cleaned it." TR 90. Spearin told the Complainant that N228CC was used to transport a man who was a liver transplant candidate. TR 90-91. Spearin told the Complainant that the man had arrived at the airport in an ambulance and he looked like he was in rough shape. TR 188. After this conversation, the Complainant said he was concerned about the condition of the aircraft. TR 91. He had touched all parts of N228CC without wearing any protective equipment, and he had not received any training from EAC about the handling of human or biological waste. TR 91, 186.

The Complainant spoke with Spearin about the condition of the plane again early in the morning on July 6, 2004. TR 91-92. Spearin had told the Complainant N228CC was supposed to be cleaned, and that Boston MedFlight would come down and clean the aircraft. TR 92, 188-189. The Complainant reports that Spearin told him that Spearin learned from Leonard Carroll, the FBO manager at EAC, that Boston MedFlight was coming to clean the plane. TR 189, 216. The Complainant said that as far as he knew the N228CC aircraft was never cleaned by Boston MedFlight. TR 92.

After waiting several days and not seeing the aircraft being cleaned, the Complainant placed two phone calls from his home on July 14, 2004 between 10:30 and 10:45 a.m. prior to reporting to work for his noon to 4 p.m. shift. TR 92-93. The first call was made to Boston MedFlight at about 10:30 a.m. to ask if they were going to be sending a crew to clean N228CC, as the Complainant had been told by Spearin. TR 94, 96. The Complainant testified that he wanted to know this "[b]ecause if I ever had to go over it again for the safety of myself and others." TR 94. The Complainant was aware of N228CC being used for at least three charters between July 4, 2004 and his call to Boston MedFlight, including at least one charter that included children passengers. TR 93.

During this conversation with Boston MedFlight, the Complainant did not know who he was speaking with, but he eventually learned he had spoken to Andrew Farkas. TR 94. The Complainant did not identify himself by name to Farkas because he feared repercussion from EAC. TR 96-97. The Complainant asked Farkas if he was aware of N228CC at EAC, and Farkas responded that he knew of the aircraft. TR 94. The Complainant asked Farkas if he was aware that the aircraft transported a liver recipient candidate and the passenger soiled the aircraft. TR 95. Farkas responded that he was not aware of that. The Complainant said, "[W]ell, I was told that Boston MedFlight would send a crew down to [EAC] to clean that aircraft. . . ." *Id.*

Farkas stated that this was not necessary because line personnel and mechanics have been trained to clean up biohazards. The Complainant told Farkas this was not true because he worked at EAC. *Id.* The Complainant told Farkas that EAC "could get fined for this kind of activity, and [he hoped] that [Boston MedFlight] would come down and clean the aircraft." *Id.* The Complainant didn't think he was getting anywhere, so he told Farkas he "was going to call the FAA, because [he] had another issue as well." *Id.*

The Complainant knew that Boston MedFlight was one of EAC's biggest clients when he made this call, but he said he did not call in an effort to hurt that relationship. TR 99. He called with the intention of getting the N228CC aircraft cleaned. *Id.* When presented at the hearing with a memo that Mr. Farkas sent to EAC following the Complainant's call, the Complainant stated that he "just asked [Farkas] if he was aware of a patient on . . . the aircraft" and he denied using the term "airmedical missions" which appears in the memo TR 97; CX-2. The Complainant testified that he never told Farkas that the patient had hepatitis, but he did ask Farkas, "What if he has hepatitis?" TR 97-98. The Complainant also said that the language in the Farkas memo is not accurate regarding fines. TR 167. He acknowledged that he did tell Farkas that he was going to pass the information on to the FAA, but he denied asking Farkas if he was aware that EAC had received some fines. TR 98; CX-2. The Complainant testified that he told Farkas that EAC "could receive fines through the FAA" meaning that EAC could be investigated by the FAA for the condition of N228CC. TR 98-99, 167. The Complainant said he did not reference fines that EAC had received in the past during his call with Farkas. TR 99.

After speaking with Farkas, the Complainant placed a telephone call to the FAA's Flight Standards Division in Lexington, Massachusetts. TR 99-100. He was not sure who he spoke with, but he told the person he worked for EAC and reported the condition of N228CC since he felt it was unsanitary. TR 100. He told the FAA that a liver patient had soiled the aircraft, and he had "waited and waited to see if that aircraft was going to be cleaned, and it [had] not been cleaned yet." *Id.* The Complainant also reported another aircraft that was alleged to have been overweight on take-off. *Id.*

Following the two phone calls, the Complainant reported for work at EAC from 11:45 a.m. and left at 4:20 p.m., although he punched out at 4:00 p.m. TR 100-101, 123. During Complainant's shift on July 14, 2004, no one from EAC spoke with him about his telephone call to Boston MedFlight or about his employment status. TR 101. The Complainant had scheduled vacation days off of work from July 15-17, 2004. *Id.* No one from EAC contacted him during those three days to terminate his employment, discuss his employment status, or discuss his telephone call to Boston MedFlight. TR 101-102.

The Complainant states that Burke called him at home on July 16, 2004, between 12:30 and 1:30 p.m. from his cell phone. TR 102-103. Burke informed the Complainant that the FAA had visited EAC, and that "Lenny's running around here like a chicken with his head cut off." TR 103. Burke told the Complainant that the FAA had been down the fuel farm and maintenance. *Id.*[4]

[4] The Complainant later made an inquiry in November of 2004 to the FAA to confirm that they had actually visited EAC on July 16, 2004. TR 160; RX-5. The FAA report of the visit to EAC, dated July 16, 2004 at 10:00 a.m., states the following:

The Complainant was scheduled to work the morning of July 18, 2004. TR 108. He proceeded to EAC, but his security badge would not work. *Id.* He went inside and noticed that his time card was not in its slot, so the Complainant could not punch in. TR 108, 177. The Complainant was pulled aside by Carroll, who said he had to speak with the Complainant. TR 108, 177. The time was 7:01 or 7:02 a.m. TR 177. Carroll handed the Complainant a letter in an envelope ("the termination letter"). TR 108. The termination letter stated, in pertinent part, "Please be advised that your employment at Eastern Air Center is terminated, effective immediately. This action is a result of your actions not in compliance with Eastern Air – Company Manual concerning fraudulent statements to our customers and others." CX-6. The letter was dated July 18, 2004, and was signed by Len Carroll, FBO manager. *Id.* A copy of the letter was sent to Bahig Bishay, chief executive manager. *Id.* The Complainant testified that Carroll stated, "You called Boston MedFlight," and that he could gather his belongings. TR 109.

The Complainant believed Carroll and Spearin were authorized to hire and fire him. TR 148. In July of 2004, the Complainant's FBO manager was Carroll. *Id.* At the time the Complainant was terminated, he was not aware that Bahig Bishay was in charge of EAC and that Bishay had the power to terminate him. TR 150. The Complainant was not aware of any communication between anyone at the FAA and either Bishay or Carroll regarding the Complainant prior to his termination. TR 152.

The Complainant states that he never violated EAC's employee manual. TR 171. Under conduct that must be avoided by all employees, EAC's employee manual states, "Failure to adhere to safety and health rules and procedures or to follow common safety practices jeopardizing the well being of yourself, others, or customers." RX-6 at 16; TR 184. The Complainant believed that if he did not complain about the condition of N228CC he might be violating that provision of the employee manual. TR 184. The Complainant also noted another page of the employee manual which states, "Safety is everyone's business. All of us at Eastern Air Center are committed to the task of maintaining a healthy and safe work environment. . . . For your protection, the Company will enforce all safety regulations. . . . We encourage you to

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> Subject: Investigate improper disposal of Bio hazard waste from med flight aircraft.
>
> Digest: On July 16, 2004 myself and inspector Jack Keenan of the Boston Flight Standards District Office went to Eastern Air to investigate a complaint that N228CC had possibly illegally disposed of Bio hazardous waste that resulted from a patient that was transported aboard the aircraft on a medical flight.
>
> Upon our arrival we noticed that the Aircraft (N228CC) was in various stages of renovation with all the carpeting removed from the interior. We inquired as to why the aircraft was having new carpets installed and the mechanic said that it was due to the interior being old and in need of replacement.
>
> Inspector Kennan and myself could not determine where the discarded interior rugs were disposed of.

CX-5. The report was signed by Paul Falzarano, Aviation Safety Inspector. *Id.*

think 'safety and health' and to report any conditions that you feel could jeopardize the health and well being of you or a fellow employee. . . ." RX-6 at 12; TR 184.

The Complainant reports that after he was terminated from EAC, he looked for other employment. TR 111. He testified that he called various heavy equipment companies and welding jobs and read the classified and help wanted sections of the newspaper every day. *Id.* The Complainant was hired by General Safety Services in Dedham, Massachusetts in January of 2005, and he began to work for them in March of 2005. TR 114, 78; CX-7. He installed roof anchors and washed windows. TR 114. He was paid $16.50 per hour and worked approximately forty hours per week. TR 115. The Complainant said that he left General Safety Services voluntarily in May of 2005 because of safety issues. TR 115, 114. He did not report these safety concerns to anyone at General Safety Services. TR 127. The Complainant has not worked since he left General Safety Services. TR 78.

From 2000 until he began work with EAC in September of 2003, Complainant had approximately ten jobs. TR 191, 82. After the Complainant left General Safety Services he looked for employment, but states that he has not been able to obtain an offer from a company with health benefits. TR 116-117, 191-192. The Complainant has been offered positions where he would be paid "under the table," but he testified that "I can't take that kind of work, where some of those have been offered to me. I can't go there." TR 117. The Complainant believes he is having a hard time finding employment because he has to put on his employment applications that he was terminated from EAC for calling OSHA. TR 192. The Complainant said he will not take a job that pays him cash because he would have to show where the money was coming from as he has children to support. TR 191-194. He is currently being supported by his girlfriend with whom he resides. TR 192-193. *See* CX-7 and RX-2.

Since the Complainant was terminated from EAC, he earned $7,693 with General Safety Services and he earned $200 helping some of his girlfriend's son's friends with their car. TR 116, 117; CX-8; RX-7. The Complainant testified that he did not collect unemployment after he left General Safety Services. TR 118. However, the Complainant did receive $6,502 in unemployment benefits from July 18, 2004 through January 29, 2005 following his termination from EAC. JX 1.

B. Testimony of Andrew Farkas

Andrew Farkas is the chief operations manager for New England Life Flight Incorporated. TR 35-36. The company does business as Boston MedFlight, and is located at Hanscom Air Force Base in Bedford, Massachusetts and Plymouth Airport in Plymouth, Massachusetts. TR 36, 37. "Boston MedFlight leases one primary jet . . . and one alternate jet (N228CC) to conduct medical flights from [EAC at Hanscom Air Force Base]. . . . All maintenance and upkeep of the two planes is performed by [EAC]. [Boston MedFlight] provides only the medical crew while [EAC] will provide the pilots who report to [Boston MedFlight] in Bedford." CX-1 at 1; TR 36-37. EAC and Boston MedFlight's relationship began in 1999 and ended in May of 2006. TR 37. The relationship ended according to Farkas because EAC "had a rotating door administration and operational people, and no clear ownership of the company . . ."

so Boston MedFlight decided to go with a different vendor when its contract with EAC expired. TR 37-38.

Farkas received a telephone call from the Complainant on July 14, 2004 at around 10:30 a.m. TR 38; CX-2. One of the staff members answered the call and stated, "I have somebody that has a concern," so Farkas took the call. TR 39. The Complainant did not identify himself, but at some point later Farkas learned the caller was the Complainant. *Id.* The Complainant identified some concerns he had about a gentleman who was transported from Norwood Airport on an earlier date to Florida who was going for an emergency liver transplant. Farkas stated the caller said that on the return flight the aircraft was contaminated "with some type of excrement from the patient – or person." *Id.* The Complainant brought to Farkas' attention that EAC was not properly trained to deal with this type of hazardous material. *Id.* The Complainant expressed his concerns to Farkas and stated he would be addressing his concerns with the FAA. TR 39-40. Farkas understood that the Complainant "had brought [his concerns] . . . to the FAA's attention and he [felt] that [EAC] were going to receive fines for . . . his concerns." TR 42; CX-1 at 2.

Farkas said that he informed his executive director of the call and he called Stu Piasecka at EAC at 10:50 a.m. and informed him of the conversation. TR 44-45; CX-1 at 2. Farkas generated a memorandum ("the Farkas memo") regarding his conversation with the Complainant, and Piasecka requested that Farkas fax the memo to him. TR 44-45. Farkas faxed the memo to EAC in the early afternoon, sometime around 1:00 p.m.. TR 45, 57. The Farkas memo stated:

> Date: July 14, 2004
>
> From: Andrew Farkas, Program Manager
>
> Re: Phone call received 7/14/2004 @ approximately 10:30
>
> Traci Powers RN received a call on BED crew side phone from unidentified male who stated he had some concerns about Eastern Air Charter. She gave individual BMF administration phone to call to relay concerns. I spoke with individual who would not identify himself, but caller ID phone number was 781-784-7458. He inquired if BMF knew that EAC was doing airmedical missions through their charter operation. I suggested that he call EAC administration, but he continued to state several issues. He stated recently that EAC had transported a patient who arrived at OWD via ambulance and was transported to Florida for a liver transplant. He also stated that patient had urinated in the aircraft, "? Had hepatitis" and also stated that "line staff had no specific training on cleaning up this type of mess". He specifically mentioned that aircraft involved was "228CC". He also stated that this information was being passed onto the FAA and inquired if we were aware that EAC had received some "fines". I again

> suggested he contact EAC with his concerns. There were no further communications after this.
>
> I immediately spoke with Stu Piasecka, EAC Director of Operations and Suzanne Wedel, BMF Executive Director regarding this phone conversation.

CX-2. BMF refers to Boston MedFlight. TR 97.

Farkas testified that the statement in his memo "? Had hepatitis" meant that the Complainant was questioning whether the patient had hepatitis, since the Complainant had "no medical history of the patient [and] no direct contact with the patient. . . ." TR 48-49. Farkas agreed that the "? Had hepatitis" notation in his memo did not mean that the Complainant told him the patient had hepatitis, but rather that the Complainant was raising a question as to whether or not the patient had hepatitis. TR 48-49.

Farkas testified that EAC's Piasecka told Farkas that he was able to discover that it was the Complainant who called Farkas "by the way of [the Complainant's] telephone number and Caller ID. . . ." TR 49; CX-1 at 2. Farkas stated that the Complainant's call did not raise concerns for Boston MedFlight in regards to the safety operations at EAC, and it did not place EAC's relationship with Boston MedFlight in jeopardy. TR 50-51. Farkas testified that EAC never asked Boston MedFlight to send a crew to clean N228CC, and Boston MedFlight never did send a crew to clean N228CC. TR 51.

On July 28, 2004, Farkas stated the Complainant called him again and asked for clarification of what was stated in the Farkas memo.[5] TR 63; RX-1. Farkas stated that he "had written down the concerns [the Complainant] had with EAC and forwarded these in a verbal and fax format to Stu Piasecka, EAC Director of Operations." RX-1. The Complainant stated he was fired after Bishay received the Farkas memo. *Id.* "[The Complainant] informed [Farkas] that he was terminated for making fraudulent statements to Boston MedFlight which he denied." CX-1 at 3. Farkas wrote another memo regarding this follow-up call. TR 63; RX-1.

C. Testimony of Jeffrey Adams

Jeffrey Adams has been employed by the MBTA in Boston, Massachusetts since October of 2004. TR 196. He worked for EAC from approximately February of 2002 to September or October of 2004 as a certified aircraft repair technician. *Id.* His duties were to maintain the aircrafts for flight. He performed basic inspections and repaired any type of mechanical failure. *Id.*

Adams remembers the FAA coming to EAC during the week of July 14, 2004, and he has no reason to doubt that the FAA came to EAC on July 16, 2004. TR 196-197. That day, Adams was in the vicinity of N228CC. TR 198. He testified that he was in the maintenance hangar for

[5] Farkas testified that the Complainant made a follow-up call to Farkas. TR 63. However, in Farkas' statement to OSHA he stated that he called the Complainant to confirm and clarify his conversation with the Complainant on July 14, 2004. CX-1 at 3.

an inspection, and he and his coworkers had done some work to the aircraft. *Id.* As he was finishing up his duties for the day, two FAA agents approached him around 10:00 a.m. TR 198, 207. The agents looked at N228CC and asked Adams what he was doing with the floor. TR 198. He responded, "We're replacing the carpet." *Id.* The agents asked where the carpet was, and Adams responded, "I don't know." The FAA agents then told Adams they were going out to the other end of the airport. *Id.* Adams testified that he interpreted this as meaning that FAA was going to Operations. *Id.* Operations is at the opposite end of the airport from the maintenance hangar. *Id.* When the FAA agents exited the maintenance hanger, Adams testified that the agents walked in the direction of Operations. TR 198-199, 204, 205. However, Adams did not see the FAA agents enter the terminal area where Operations is located. TR 206. When Adams spoke with the FAA agents, there were other mechanics standing next to him. TR 199. The only person Adams remembers who was in close vicinity to him while he spoke to the agents was John DeMaggio. *Id.*

During late afternoon on July 16, 2004, Adams had a conversation with Piasecka in the offices of the maintenance department. TR 199, 213, 214. Adams stated that Piasecka primarily oversees all of what happens in the maintenance hanger. TR 199. Adams understood Piasecka to be in a management role. *Id.* Adams testified that he remembers Glen Juber, the Director of Maintenance, being involved in the conversation as well. TR 200. However, he testified that he could not accurately recall if Juber was actually there. TR 213. Adams testified that sometimes they would get together at the end of the day and talk about how things were going. TR 200. During this conversation, Adams mentioned that the FAA had come to look at N228CC's floor. *Id.* Adams testified that, "They didn't respond at all. They just, just looked at me." *Id.*

D. Testimony of Leonard Carroll

Leonard Carroll has been an employee at EAC for almost 50 years. TR 215-216. He is currently the FBO manager which, in essence, is the facility's manager. TR 216. This is the position he held back in July of 2004. *Id.* Carroll supervises approximately nine or ten people, some of them being refuelers and the rest being customer service employees. *Id.* His duties include arranging the schedules, and arranging for the training, maintenance and upkeep of the facility. *Id.* He handles matters with the FAA and also with the NODE Airport Commission and other government agencies. *Id.* Carroll also handles airport security and manages the fuel farm and fuel trucks. *Id.* He is a part of the management team at EAC, and he hires and fires employees of EAC and stated that he fired the Complainant TR 217.

Carroll testified that he was on vacation from July 3, 2004 until July 13 or 14, 2004. TR 234. However, Carroll testified that he drafted a memo sent July 7, 2004 to all line department employees at EAC. TR 264-265. The memo stated:

> On occasion, the Charter Department will request that an aircraft be cleaned for the next flight or after an unusual long flight.
>
> Usual servicing includes a vac and wipe down of the cabin areas, cleaning up spills and emptying the rubbish. Good operating practice dictates that protective measures be taken which would

> include using rubber or latex gloves, and eye protection when using chemicals.
>
> If a request is made to service the potty, those requests should be directed to the Service Department as removal of the equipment is required as well as special handling. Flights of a medical nature require special handling and the personnel servicing the aircraft will have received training in accordance with safety regulations.
>
> Training will be scheduled for Line Service personnel in the near future. If you have not received training on special procedures (medical – body fluids – etc.) or if you are not comfortable with the task at hand, please inform your supervisor of same. Training will be conducted by MedFlight personnel and coordinated with Rubens Machado.

CX-10; TR 264-265.

Carroll testified that on July 12, 2004, Spearin, the line crew supervisor, sent a memo to the line department with the subject, "Infection Control." CX-13; TR 268. In the memo, Spearin stated that a mandatory training would be conducted on July 23, 2004, coordinated through "MedFlight technician, Rubens Machado, Chief Pilot, and Len Carrol[l]." CX-13. Carroll testified that he received this memo, and Carroll was copied on the memo. TR 268; CX-13. The Complainant's name was listed on the memo as an employee required to attend the training. CX-13.

Carroll said that when he returned from vacation on July 14, 2004, Spearin mentioned to him that there was an incident that occurred with the cleaning in one of the airplanes while Carroll was away. TR 235. Carroll stated that Spearin did not tell him that the Complainant made fraudulent statements. *Id.* Carroll testified that Spearin told him that the Complainant was talking to anyone that would listen in the airport about the incident. TR 239-240. Carroll said that Spearin told him the other people who the Complainant was talking to were government agencies, and the FAA was mentioned. TR 240.

Carroll saw the Farkas memo approximately mid-afternoon on July 14, 2004. TR 325. Carroll said that he went to Bishay's office in the afternoon on July 14, 2004 with the Farkas memo along with Piasecka. TR 326. They had a copy of the employee manual, and Carroll testified that "there was clearly some . . . things that had been violated. . ." *Id.* They discussed customer relations and how it was "going to be murder" for EAC to overcome what the Complainant had stated to Boston MedFlight. TR 327. Carroll identified for Bishay the provisions of the manual he believed were violated based on the Farkas memo. TR 328-329, 345. Carroll circled three areas in the employee manual he believed the Complainant had violated. TR 339-341. The three areas Carroll circled are listed below:

> Following is a partial list of prohibited conduct. Transgression of any of these rules could result in immediate discipline up and

> including termination of employment. This list is by no means all-inclusive. The Company will assess conduct as it occurs and will be free to discipline employees as the situation dictates, in its sole discretion, for any conduct it deems to be improper, unreasonable or otherwise intolerable. This list is meant to highlight certain types of conduct that must be avoided by all employees. . . . 2. Dishonesty or misrepresentation to Eastern Air Certain, Inc. or a customer. . . . 11. Falsifying or omitting pertinent information on an employment application, medical record or other company records; giving false replies or testimony to official company representatives in a matter relating to company activities, business affairs, etc. . . . 15. Slandering, making false or malicious statements concerning any employee or the Company, its products, its service, or customers and/or their products. . . .

RX-6 at 16-17; TR 328-329, 341-344.

On cross-examination, Carroll conceded after rereading number 11 that he was wrong in thinking that the Complainant violated that provision of the employee manual. TR 344. Carroll believed the Complainant violated number 15 because of the fraudulent statements he believed the Complainant made to Boston MedFlight that were contained in the Farkas memo. *Id.*

Carroll testified that Bishay wrote on the Farkas memo, "Employee must be terminated at once." TR 337-338; RX-14. Bishay gave the Farkas memo to Carroll with his handwritten comment on July 14, 2004 after 4:00 p.m. and told Carroll to terminate the Complainant. TR 329-330, 338, 276. The reason Bishay gave Carroll for terminating the Complainant was for violating the employee manual. TR 330.

Carroll said that when received the Farkas memo with the writing from Bishay, he went to see if the Complainant was still at EAC so he could talk to him. TR 338. Carroll did not find Complainant because he had left for the day. *Id.* The Complainant's time card stated that he was off work at 4:00 p.m. that same day. TR 331. Carroll was aware of the Complainant's schedule because Carroll makes the schedule. TR 330. Carroll knew that the Complainant was not at work from 4:00 p.m. on July 14, 2004 until 7:00 a.m. on July 18, 2004 because he checked the schedule. TR 332-333. Carroll said that he did not call the Complainant from July 15-17, 2004, because he does not call people on the telephone to terminate them. TR 338-339.

Carroll conceded that it was possible that the FAA was at the airport on July 16, 2004, and he would not have known about it. TR 348. The EAC airport is a general aviation airport for corporate, privately-owned aircraft. TR 346. There are secure and unsecured sections of the airport. *Id.* The maintenance area is a fenced-in area, and visitors need an escort or a badge to get there. TR 346-347. The maintenance department is at the north end of the airport, and Carroll's office is in the south end of the airport where the terminal is, about a half mile away. TR 347. Carroll's office is on the second floor in a secure area. *Id.* Carroll explained that the FAA has a duty to perform inspections at airports on a regular basis. *Id.* Usually the FAA announces their arrival prior to coming to the airport. TR 347-348. If it was an inspection in

response to a complaint they would not announce their arrival to Carroll because he is not involved with Maintenance or in the Charter Department. TR 348.[6]

Carroll reports that Falzarano is an FAA inspector, and he testified that Falzarano never got in touch with him regarding a complaint or an investigation he was undertaking on behalf of a complaint filed by the Complainant with the FAA. TR 311; *see also* CX-5. Carroll testified that he was not sure of the exact date of when he learned about the FAA's visit to EAC on July 16, 2004. TR 311. However, he testified that he did learn about the visit "considerably after" July 16, 2004. *Id.*

On the morning of July 18, 2004, Carroll gave the Complainant the termination letter. TR 217-218. In a personal note Carroll made regarding the termination of the Complainant, he stated that "Bryan was intercepted at 0700 in the lobby at the Terminal Building. He was taken aside and told that his employment at Eastern Air had been terminated due to the fact that he had made fraudulent statements to our customers." CX-9; TR 242. From the time Carroll came back into the office on July 14, 2004 until July 18, 2004, when Carroll terminated the Complainant, Carroll did not speak with the Complainant. TR 276. Carroll testified that he was not aware of anyone from EAC management speaking to the Complainant during that time period. *Id.*

Carroll testified that he drafted the termination letter on his office computer. TR 218. Contradicting his previous testimony that he fired the Complainant, Carroll stated that although it was Bishay who made the decision to fire the Complainant, the termination letter did not state that because the Complainant worked for Carroll and not Bishay. *See,* TR 217, 345, 350. Carroll never told the Complainant it was Bishay who fired him. TR 350. Nevertheless, Carroll acknowledged that he weighed in on the termination decision Bishay made by taking the Farkas memo to Bishay and identifying and discussing provisions of the employee manual he believed the Complainant violated. TR 351.

Carroll testified that the sentence in the termination letter, "This action is a result of your actions not in compliance with the Eastern Air - Company Manual concerning fraudulent statements to our customers and others," sets forth the reason that the Complainant was fired. TR 218; CX-6. The "fraudulent statements" in the termination letter refer to statements in the Farkas memo. TR 219. Carroll said that the fraudulent statements that were used as the basis to fire the Complainant were the fraudulent statements reflected in the Farkas memo. TR 253.

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[6] Carroll knows Jack Keenan who works for the FAA and visited EAC on July 16, 2004. TR 309; CX-5. Carroll has been close friends with Keenan for about 35 years. TR 309. Keenan knew that Carroll still worked at EAC as of July 16, 2004. *Id.* Carroll stated that usually when Keenan comes to the airport, he would stop by to have a chat. TR 309-310. Carroll testified that he would have been disappointed if he knew Keenan was at the airport and he did not look Carroll up. TR 310. Carroll testified that he does not disbelieve that Keenan visited EAC on July 16, 2004. TR 336. Carroll testified that Keenan has never called, written, or communicated with him in any way regarding a visit or an investigation that he undertook on behalf of the Complainant. TR 310-311. If Keenan received a complaint about EAC, Carroll does not think Keenan would have spoken to him about it prior to his arrival. TR 348-349. Carroll stated that he and Keenan are such good friends that they do not mix business with "social stuff." TR 349. Carroll acknowledged that he would not be surprised if Keenan were at EAC in response to a complaint and he did not talk to Carroll about that particular complaint. *Id.*

Carroll reported that the Farkas memo was the only solid piece of evidence from which he gathered the fraudulent statements because he did not like the "hearsay and rumors that were going around the airport." TR 253-254.[7]

Carroll identified two fraudulent statements he relied on in the Farkas memo that led Carroll to terminate the Complainant. TR 231-232. The first fraudulent statement was "? Had hepatitis." TR 231; RX-14. Carroll initially stated that he thought Farkas' "?Had hepatitis" meant Farkas was wondering why the Complainant would think this. TR 219-220. However, Carroll then acknowledged that he never spoke with Farkas regarding his phone call with the Complainant. TR 220. Carroll eventually admitted that he did not know what Farkas meant by the phrase "? Had hepatitis" because he never asked Farkas what he meant. TR 221-222. When asked by Florek's counsel whether it was possible that the phrase meant that Florek was questioning whether or not the patient had hepatitis, Carroll responded "I don't think so." TR 222.

The second fraudulent statement Carroll cited for the discharge was "also stated that 'line staff had no specific training in cleaning up this type of mess.'" TR 223; RX-14. Carroll agreed that the line department did not have training in cleaning up human waste, but, he stated the line department did have training on how to clean an airplane. TR 224, 225. He testified that the training was handled by the department supervisor, Spearin, but Carroll was not sure if the Complainant received any training concerning biological waste. TR 224-225. Carroll thought the statement in the Farkas memo was fraudulent because he did not know if the Complainant was referring to a mess from cups, papers, and the normal debris from a flight. TR 225. The toilets are used "once in a blue moon on these airplanes" and Carroll testified that if EAC cleaned one toilet in six months that is a lot. TR 226. Carroll agreed that the line staff did not have any training in cleaning up urination. *Id.* Even though the phrase "this type of mess" appears in the same sentence as "had urinated in the aircraft" in the Farkas memo, Carroll insisted that he did not understand that the Complainant was referring to the urination. *Id.* Carroll did not call the Complainant and ask him what he meant. *Id.*

Carroll also explained what he meant in the sentence in the termination letter telling the Complainant he was fired for "fraudulent statements to our customers and others." TR 233; CX 6. Carroll said that when he referred to "customers" he was referring only to Boston MedFlight. TR 233. Carroll maintained that he wrote "customers" in the plural because that is the way he writes. *Id.* He also said that the termination letter's reference to "others" meant other employees at EAC. TR 233-234. Carroll said that before he terminated the Complainant, "other" EAC employees came to him and told him what the Complainant was saying about N228CC. TR 234. One of the employees was Spearin. *Id.*

Carroll acknowledged that the Complainant would have had a valid concern if everything that he said in the Farkas memo was true, but Carroll believes there were a lot of things the Complainant said that were not true. TR 259-260.[8] Carroll stated that at the time the

[7] Caroll stated the rumor he heard was that there was an incident that the Complainant was involved with a potty. TR 254-255.

[8] Carroll testified that in response to concerns he received from another employee, which included a concern about the flight the Complainant questioned, he asked Sharon Meredith from the Charter Department to call the health

Complainant was out to harm EAC. TR 260. Carroll testified that the Complainant's call to Farkas was damaging to EAC's name and goodwill. TR 255. It was damaging to EAC's name because Boston MedFlight was a million dollar account for EAC. TR 255, 312, 314. EAC no longer has the account and Carroll suspects that the incident with the Complainant is part of that reason. TR 255. However, Carroll admits that no one, including Boston MedFlight, ever told Carroll or anyone from EAC that EAC lost the account because of the Complainant's phone call. TR 258, 339.

EAC lost Boston MedFlight as an account more than two years after EAC terminated the Complainant. TR 258. Carroll testified that he believes that the only reason Boston MedFlight stayed on for that long was because it had a contract with EAC that involved an aircraft that Boston MedFlight had agreed to lease during the duration of that period. *Id.* Carroll stated that as soon as the lease ran out, Boston MedFlight did not renew the contract. *Id.*

Carroll received a notice from OSHA dated July 27, 2004, which indicated that OSHA received a notice of safety and/or health hazards at EAC. CX-14; TR 272. The specific nature of the alleged hazards were: "Employees are exposed to blood and blood by-products from medical patients and have not had Bloodborne Pathogens training; Employees exposed to bloodborne pathogens have not been offered hepatitis B vaccinations; The Employer does not have a written exposure control program for employees exposed to bloodborne pathogens…" CX-14. Carroll responded to OSHA's notice in a letter dated August 3, 2004 addressing the alleged hazards. CX-15; TR 273-274.

Carroll testified that he learned that the Complainant had filed a complaint with OSHA sometime in September of 2004. TR 335. Carroll was interviewed by OSHA with respect to the Complainant's concerns. TR 243. As a result of the interview, the OSHA investigator prepared a statement and sent it to Carroll. *Id.* However, Carroll said that he did not agree with what the OSHA investigator wrote about the discussion, so Carroll sent the statement back to OSHA indicating the statement was inaccurate. *Id.* Carroll conceded that he may have told the OSHA investigator in an informal discussion that word going around the company was that Florek had called MedFlight and OSHA and the FAA, and anyone who would listen to the company. TR 261. Carroll testified that, prior to meeting the OSHA investigator, he was not aware that the Complainant had filed any complaint with the FAA. TR 335.

On September 16, 2004, the attendance records for an OSHA/Infection Control Training session at EAC shows that Carroll attended the training session. CX-12; TR 267. Some pilots and some line service people signed up for the training session as well. TR 266-267. On November 17, 2004, EAC held another OSHA/Infection Control Education training session. CX-11.

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officials at the University of Miami where the liver transplant candidate from N228CC was being treated. TR 317-318; RX-10. Meredith responded to Carroll's request with a letter dated July 19, 2004. RX-10. Meredith reported to Carroll that the patient on N228CC did not have anything infectious or contagious. TR 318; RX-10. The patient called Boston MedFlight to check if he needed a medical flight, and Boston MedFlight told him he was a regular passenger who qualified for a regular charter flight. TR 318. Therefore, EAC had him as a passenger on a regular flight but the patient did have a problem with the potty on N228CC. *Id.*

E. Testimony of Bahig Bishay

Bahig Bishay started working at EAC in early 2004, and he is currently the executive manager and the agent for service. TR 371, 368. Bishay reports to shareholders. TR 369. He does not have an ownership interest in EAC. *Id*. As an executive manager, Bishay makes corporate decisions such as entering contracts with clients, hiring and firing other managers, listening to recommendations or disputes regarding hiring or firing on the lower level, handling disputes with either clients or insurance companies, and negotiating and participating in real estate leases for the airport. TR 368-369. As an agent for service, Bishay interacts with government agencies regarding compliance issues. TR 370. Bishay notes that during 2004, EAC had approximately 50 employees. *Id.* At the time of hearing, EAC had approximately 30 employees. *Id.*

Late in the afternoon on July 14, 2004, Bishay learned that an employee from EAC had contacted Boston MedFlight. TR 371-372. Bishay reports that Carroll and Piasecka came to his office and told him there was an emergency matter they needed to discuss with him. TR 372, 374. They gave Bishay the Farkas memo. TR 372-373. He asked them to sit down and discuss the matter, check the employee manual and to find out which EAC employee made the call. TR 373-374. Bishay also said that Carroll and Piasecka matched the phone number on the Farkas memo to the Complainant's home phone number. TR 373-374. Bishay maintains that Piasecka was a senior accountant for EAC at the time and he was never director of operations. TR 376. Bishay said that the Complainant did not have direct contact or communication with Piasecka since the Complainant worked in the line department. TR 377. The Complainant reported to Spearin, who reported to the FBO manager, Carroll. *Id.* Carroll reported to Bishay. *Id.* When asked why Piasecka was involved with this matter, Bishay testified that Piasecka may have been the one who received the fax. TR 378. Piasecka never came to Bishay the morning of July 14, 2004, to talk to him after Piasecka received the call from Farkas. TR 434. When asked if it troubled him that he did not find out about the call Piasecka received until late afternoon, Bishay testified it was the policy of EAC that they do not consider anything a "fire drill" unless there was something in writing. *Id.*

After reading the Farkas memo, Bishay thought the Complainant was bad-mouthing EAC. TR 381. Bishay was troubled that the Complainant contacted EAC's biggest customer. TR 373. Bishay did not call the Complainant to discuss the Farkas memo. TR 382. Bishay stated that he accepted what Farkas said in the memo as an accurate reflection of the conversation that he had with the Complainant. TR 383, 386-387. Bishay said that the Farkas memo specifically stated that the Complainant was going to report the incident to the FAA. TR 383-384; CX-2. Bishay accepted this as a statement which the Complainant relayed to Farkas, but Bishay did not accept it as a real action on the part of the Complainant which he would actually carry out. TR 384-385. Bishay stated he had doubts about what action the Complainant would take because he did not give much credit or weight to the Complainant's statements. TR 385.

Carroll and Piasecka returned to Bishay's office later in the afternoon on July 14, 2004 with the current employee manual. TR 374; RX-6. Bishay asked them to direct him to the pages within the manual where he could find potential violations. TR 374. Carroll and Piasecka

directed Bishay to these pages and circled what they thought were three pertinent prohibitions in the employee manual for Bishay to consider. TR 375, 378-379; RX-6.

Bishay identified four false statements in the Farkas memo with the first false statement being, "that EAC was doing airmedical missions through their charter operation." TR 415; CX-2. Bishay did not check with Farkas or the Complainant to see if that is actually what the Complainant said. TR 415-416.

The second false statement was "? Had hepatitis" since Bishay thinks this led Farkas to believe the patient had hepatitis. TR 416; CX-2. Bishay testified that he construed Farkas' notation "? Had hepatitis" to mean that the Complainant put doubts in Farkas' mind and had no basis for the statement. TR 416, 387. Bishay did no investigation other than looking at "? Had hepatitis" to find out what the Complainant meant. TR 417.

The third false statement was that "line staff had no specific training on cleaning up this type of mess." TR 421; CX-2. Bishay knew the Complainant had training for basic cleaning of an aircraft, and Bishay's understanding of the mess at the time of the incident is that somebody either spit, urinated, or vomited on board the aircraft. TR 421. Bishay downplayed the situation, stating that you find human fluids in the trash basket of an aircraft. *Id.* Bishay said he knows the Complainant was trained to clean the interior of an aircraft which includes napkins, Kleenex, and paper towels and these cleanings include human fluids. TR 423. Bishay admitted that he was not aware if the Complainant had any training prior to July 4, 2004 to handle biohazards or bloodborne pathogens. TR 388.

The final false statement was that EAC had received some "fines." TR 424; CX-2. Bishay testified that EAC had never received any fines from the FAA. TR 424. Bishay did not contact Farkas to be certain that his construction of Farkas' memo was consistent with what the Complainant actually said to Farkas. Bishay also said that he did not contact the FAA to see if EAC had received any fines from the time he received the Farkas memo on July 14, 2004, to the time he decided to terminate the Complainant the same day. TR 428-431. Bishay testified that he did not know that EAC had been $3,300 by the FAA in September of 2000. TR 428.

At the hearing, Bishay stated that in addition to the three circled sections of the employee manual outlined in Carroll's testimony, which the Complainant is alleged to have violated, he looked to additional sections of the employee manual. TR 379. He said that the Complainant also violated number "6. Willful interference with Company operations" applicable because he believed that the Complainant had no authority to contact Boston MedFlight. TR 379-380; RX-6. Bishay testified that this interfered with a contractual relationship between Boston MedFlight and EAC which was an advantageous relationship. TR 380. Bishay believed that the Complainant partially violated number "10. Failure to comply with Company rules regarding personal appearance and conduct." TR 380; RX-6. Bishay believed the Complainant's conduct was inappropriate because he interfered with an advantageous relationship between EAC and its customer. TR 380. Bishay also believed number "20. Involving Eastern Air Center, Inc. in any act that damages the Company's reputation or good will" was appropriate. TR 380-381; RX-6. These three provisions of the employee manual, in addition to the provisions Carroll identified,

were the provisions in the employee manual Bishay considered in deciding what action to take in response to what the Complainant allegedly told Farkas as laid out in the Farkas memo. TR 381.

In any event, after discussing the situation with Carroll and Piasecka, Bishay said that he made the final decision to terminate the Complainant. TR 389. Bishay said that he told Carroll to terminate the Complainant, and Carroll drafted the termination letter. TR 440. Bishay testified that he told Carroll what to say in the termination letter. *Id.* Bishay terminated the Complainant because he made false representations to Boston MedFlight as reflected in the Farkas memo. TR 389, 415. Bishay agreed that the sentence in the termination letter which stated, "This action is a result of your actions not in compliance with the Eastern Air - Company Manual concerning fraudulent statements to our customers and others" sets forth the reason for the Complainant's termination. TR 439; CX-6. In the termination letter, Bishay testified that "customers" referred to Boston MedFlight which is made up of seven hospitals. TR 442. The term "others" referred to the employees. TR 443.[9]

Bishay acknowledged that the employee manual includes a section titled "Discharge" which provides, "[i]f your performance is unsatisfactory, due to lack of ability or failure to fulfill the requirements of your job, you will be notified of the problem and your supervisor will work with you to correct the situation." RX-6 at 7; TR 446-447. Bishay conceded that the Complainant was never notified there was a problem before he was terminated. TR 447. He said that he determined that the Complainant's problem could not be corrected. *Id.* Bishay further acknowledged that prior to the Complainant's termination, no supervisor ever worked with the Complainant to correct the situation. TR 447-448. The next sentence of the "Discharge" provision reads, "If this does not succeed, you will be given notice prior to termination." RX-6 at 7; TR 448. Bishay asserts that EAC complied with this provision because he considered "notice" to mean contemporaneous with the termination letter. TR 448. Bishay stated that Carroll gave the Complainant "notice" that he was no longer working for EAC, and then he handed him the termination letter. *Id.*

F. Testimony of Nardine Bellew

Nardine Bellew is the President of General Safety Services in Dedham, Massachusetts, a commercial window washing business. TR 284-286. Bellew confirmed that the Complainant worked for General Safety Services between March 18 to June 4, 2005, where he was a supervisor of window washers. TR 286.[10] He was paid $16.50 per hour, and he worked forty hours per week, weather permitting. TR 286, 291; RX-8. The Complainant drove crews to particular job sites and set them up with the equipment needed and he oversaw the job. TR 297. He also did window washing and some anchor installations for General Safety Services as a working supervisor. *Id.*

[9] Bishay acknowledges that on the Farkas memo he wrote "Employee must be terminated at once" but the Complainant was not actually terminated until July 18, 2004. TR 445, 449; RX-14. Bishay maintains, however, that in his mind, the Complainant was terminated the afternoon of July 14, 2004. TR 445, 449.

[10] Bellew testified that the Complainant's employment at General Safety Services ended on June 4, 2005. TR 286. However, in her affidavit she wrote than his employment ended on June 7, 2005, and in another letter she writes that the Complainant's employment with General Safety Services ended June 9, 2005. RX-8. This discrepancy in the final date of the Complainant's employment with her company is not material to the issues.

Bellew testified that the Complainant was a good worker and that he quit General Safety Services. TR 290. Bellow stated that if the Complainant did not quit, the company would have kept him as an employee. TR 290-291. Bellew does not recall the actual circumstances of why the Complainant quit. TR 298. She did recall that there was a meeting, although she did not recall the subject of the meeting, and on the day the Complainant resigned he said he was "stewing" over the meeting all weekend. TR 299. Bellew testified that she does not recall the Complainant ever raising any safety concerns while he worked at General Safety Services. TR 300-301, 302. She stated that her company takes safety complaints seriously. TR 300-303. Her own son works for her as a high-rise window washer. TR 302-303. The Complainant's gross earnings while he worked at General Safety Services was $7,693. CX-8; RX-7; TR 116.

G. Elements of an AIR21 Whistleblower Complaint

AIR21 extends whistleblower protection to employees of air carriers, contractors and subcontractors of air carriers. 49 U.S.C. § 42121(a); 29 C.F.R. §§ 1979.100, 102(a). AIR21 extends whistleblower protection to employees in the air carrier industry who engage in certain activities that are related to air carrier safety. *Hirst v. Southeast Airlines, Inc.*, USDOL/OALJ Reporter (PDF), ARB Nos. 04-116, 04-160, ALJ No. 2003-AIR-47 at 6 (ARB Jan. 31, 2007). "[AIR21] prohibits air carriers, contractors, and their subcontractors from discharging or otherwise discriminating against any employee . . . because the employee . . . engaged in the air carrier safety-related activities that [AIR21] covers." *Id., citing* 49 U.S.C. § 42121(a) (internal quotation marks omitted); *see also Brune v. Horizon Air Indus.*, USDOL/OALJ Reporter (PDF), ARB No. 04-037, ALJ No. 2002-AIR-8 at 1 (ARB Jan. 31, 2006); 29 C.F.R. § 1979.102.

To establish a violation of AIR21, a complainant must prove by a preponderance of the evidence: (1) that he engaged in protected activity; (2) that the employer subject to AIR21 was aware of the protected activity; (3) that he was subjected to an unfavorable personnel action ("adverse action"); and (4) that the protected activity was a "contributing factor" in the adverse action. 49 U.S.C. §§ 42121(a), (b)(2)(B)(iii); 29 C.F.R. § 1979.109(a); *see also Hirst*, ARB Nos. 04-116, 04-160 at 7; *Rooks v. Planet Airways, Inc.*, USDOL/OALJ Reporter (PDF), ARB No. 04-092, ALJ No. 2003-AIR-35 at 5 (ARB June 29, 2006); *Brune*, ARB No. 04-037 at 13; *Peck v. Safe Air Int'l, Inc.*, USDOL/OALJ Reporter (PDF), ARB No. 02-028, ALJ No. 2001-AIR-3 at 6-7, 9 (ARB Jan. 30, 2004).

The Department of Labor's Administrative Review Board ("ARB") has approved the Title VII burden shifting framework for use in AIR21 cases "where the complainant initially makes an inferential case of discrimination by means of circumstantial evidence." *Brune*, ARB No. 04-037 at 14. When this is the case, after the complainant shows evidence that the protected activity was a contributing factor in an adverse employment action, "[t]he ALJ may then examine the legitimacy of the employer's articulated reasons for the adverse personnel action in the course of concluding whether a complainant has proved by a preponderance of the evidence that protected activity contributed to the adverse action." *Id.* "Preponderance of the evidence is the greater weight of the evidence; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind

to one side of the issue rather than the other." *Id.* at 13, *citing Black's Law Dict.* at 1201 (7th ed. 1999) (internal quotation marks omitted).

The burden of proof shifts to the employer only if the complainant has proven discrimination by a preponderance of the evidence. *Id.* at 14. Thereafter, the employer may avoid liability under AIR21 if it demonstrates by clear and convincing evidence that it would have taken the same unfavorable employment action in the absence of the protected activity. 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a); *see also Hirst*, ARB Nos. 04-116, 04-160 at 7; *Clark v. Pace Airlines*, USDOL/OALJ Reporter (PDF), ARB No. 04-150, ALJ No. 2003-AIR-28 at 11 (ARB Nov. 30, 2006); *Rooks*, ARB No. 04-092 at 5; *Brune*, ARB No. 04-037 at 14. "Clear and convincing evidence is evidence indicating that the thing to be proved is highly probable or reasonably certain." *Brune*, ARB No. 04-037 at 14 n.37, *citing Black's Law Dictionary* at 577 (internal quotation marks omitted).

H. AIR21 Coverage

AIR21 extends whistleblower protection to employees of air carriers, contractors and subcontractor of air carriers. 49 U.S.C. § 42121(a); 29 C.F.R. §§ 1979.100, 102(a). EAC, an air carrier, does not dispute that the Complainant is an employee covered by the Act. TR 7. Thus, I find that the Complainant is an employee covered by AIR21.

I. Protected Activity

Under AIR21, an employee of an air carrier has engaged in protected activity when he has:

> (1) provided, caused to be provided, or is about to provide (with any knowledge of the employer) or cause to be provided to the employer or Federal Government information relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
> (2) has filed, caused to be filed, or is about to file (with any knowledge of the employer) or cause to be filed a proceeding relating to any violation or alleged violation of any order, regulation, or standard of the Federal Aviation Administration or any other provision of Federal law relating to air carrier safety under this subtitle or any other law of the United States;
> (3) testified or is about to testify in such a proceeding; or
> (4) assisted or participated or is about to assist or participate in such a proceeding.

49 U.S.C. § 42121(a); 29 C.F.R. § 1979.102(b)(1)-(4).

In order for the "provision of 'information' to constitute protected activity, the information must be specific in relation to a given practice, condition, directive or event, and the complainant must reasonably believe in the existence of a violation. In addition, the employee does not provide information unless he actually expresses his concerns." *Rougas v. Southeast Airlines, Inc.*, USDOL/OALJ Reporter (PDF), ARB No. 04-139, ALJ No. 2004-AIR-3 at 9 (ARB July 31, 2006) (internal quotation marks and citations omitted). "[AIR21] . . . protects not only those who report air safety violations to the government, but also those who make such reports to their employers." *Vieques Air Link, Inc. v. United States DOL*, 437 F.3d 102, 107 (1st Cir. 2006), *citing* 49 U.S.C. § 42121(a). "[A] complainant need not prove an actual violation, but need only establish a reasonable belief that his . . . safety concern was valid." *Rooks*, ARB No. 04-092 at 6, *citing Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 95-CAA-12, slip op. at 4-5 (ARB Apr. 8, 1997).

The Complainant was concerned about the condition of the N228CC aircraft when he went to clean it on July 4, 2004. He repeatedly expressed his concerns regarding his possible exposure to biohazards to his superiors, first to Burke and the following day to Spearin. On July 4, 2004, he complained about N228CC's condition to Burke whom the Complainant believed was the working supervisor on weekends as he directed the others. The next day, the Complainant asked Spearin about the condition of N228CC. Spearin was the line crew supervisor, and the Complainant reported to Spearin. The Complainant was told by Spearin that N228CC was used to transport a man who was a liver transplant candidate. The Complainant said he was concerned because he had touched all parts of N228CC without wearing any personal protective equipment, and he had not received any training from EAC regarding blood-borne pathogens.[11] The Complainant was concerned for his own health and the health of passengers, as the aircraft had not been cleaned by Boston MedFlight as he was told it would be and the plane been used on subsequent flights which included children among the passengers.

On July 14, 2004, when he felt his complaints were not being addressed by EAC, the Complainant called Boston MedFlight to see if they were coming to clean the aircraft and he called the FAA to report the condition of N228CC. The Complainant's call to the FAA resulted in a visit to EAC by two FAA investigators on July 16, 2004.

After careful consideration of the evidence, I find that the Complainant had a reasonable belief that he and others, including passengers, may be exposed to health hazards as a result of the condition of the aircraft. I further find that the Complainant engaged in protected activity when he reported his concerns regarding the condition of the aircraft and possible exposure to health hazards to his supervisor and when he contacted the FAA regarding these same concerns.[12]

[11] EAC attempts to argue that the Complainant conceded he was required, and trained, to come in contact with body-fluids absorbed by tissue and other trash aboard an aircraft. Resp't. Br. at 4. However, this argument is unpersuasive. Carroll conceded, and the Complainant testified credibly that he did not have formal training on handling biohazards. Bishay was not aware if the Complainant had any training on how to handle biohazards or bloodborne pathogens. In the absence of evidence from the company that the Complainant received blood-borne pathogen training, and the Complainant's credible testimony to the contrary, I find the Complainant had not received training on how to handle biohazards.

[12] EAC does not argue that the Complainant did not engage in protected activity. *See* Resp't. Br.

J. Whether EAC Had Knowledge of the Protected Activity

The Complainant must show that the Employer had knowledge of his protected activity. The ARB has stated that "[k]nowledge of protected activity on the part of the person making the adverse employment decision is an essential element of a discrimination complaint. This element derives from the language of [AIR21] . . . that no air carrier, contractor, or subcontractor may discriminate in employment "because" the employee has engaged in protected activity." *Peck*, ARB No. 02-028 at 14, *citing Bartlik v. TVA*, 88-ERA-15, slip op. at 4 n.1 (Sec'y Apr. 7, 1993), *aff'd*, 73 F.3d 100 (6th Cir. 1996) and 49 U.S.C. § 42121(a).

The Complainant's testimony that he reported his concerns to his supervisor, Spearin, the day after he cleaned the plane, which was the first opportunity he had to notify Spearin of the condition of the plane and his health concerns, is credible. EAC did not challenge or rebut the Complainant's statement in this regard. Carroll testified that he did not learn about the incident with the Complainant and N228CC until July 14, 2004, when he spoke with Spearin. However, there is evidence suggesting that Carroll was aware of the incident at an earlier date. For example, on July 6, 2004, the Complainant testified that Spearin told him that Carroll told Spearin that the N228CC aircraft was supposed to be cleaned by Boston MedFlight. Carroll sent a memo on July 7, 2004, three days after the incident, to employees in the Complainant's line department regarding aircraft cleaning. The memo specifically addressed requests to clean a "potty" and instructed that such requests were to be directed to the Service Department. The memo further stated that medical flights required special handling and personnel servicing the aircraft will have received training in accordance with safety regulations. The memo informed line service employees that training would be scheduled in the near future and directed the employees to inform their supervisors if they had not received training on special procedures for handling body fluids or were uncomfortable with the task at hand. Based on the content of Carroll's memo and the timing of the Complainant's conversation with Spearin on July 5, 2004, I infer that Spearin told Carroll of the Complainant's concerns as soon as the Complainant communicated his concerns to Spearin and that Carroll's memo two days later was in response to the Complainant's concerns. In any event, Carroll admitted that he knew of the Complainant's health concerns on July 14, 2004, before the Complainant was terminated.

Bishay learned of Complainant's concerns on July 14 when Carroll showed him the Farkas memo. Thus, Bishay had knowledge of the Complainant's health concerns prior to the discharge. I find that EAC was aware of the Complainant's health concerns regarding the aircraft prior to his termination on July 18, 2004.

The Complainant also asserts that EAC knew that he complained to the FAA prior to his termination. Cmp. Br. at 12. EAC denies that any of the employees involved in the decision to terminate the Complainant had knowledge of any FAA complaint at the time the Complainant was discharged and EAC contends that it was not aware that the FAA visited the airfield until the Complainant introduced an "unauthenticated" FAA report during his deposition in August of 2006. Resp't. Br. at 7, 9-10. The Farkas memo faxed to EAC on July 14, 2004 explicitly references the Complainant's concerns regarding blood-borne pathogens on the aircraft, indicates the Complainant's intention to bring his concerns to the FAA, and notes that Farkas called Stu

Piasecka of EAC immediately after he received the call. Carroll, Bishay and Piasecka all saw the Farkas memo on July 14, 2004.[13] Thus, at a minimum they knew that the Complainant intended to contact the FAA.[14] Additionally, Adams, the Complainant's co-worker, testified that the FAA came to look at the aircraft on July 16, 2004 and that he spoke to the FAA investigators when they visited EAC. Adams also told EAC management, specifically Piasecka, about the FAA visit late in the day on July 16, 2004.[15] Adams testimony in this regard was not contradicted. In light of Piasecka's knowledge of the Farkas memo and his participation in discussions with Carroll and Bishay regarding the memo two days earlier, I infer that Piasecka told Carroll and Bishay on July 16 that the FAA had visited EAC's facility. After carefully considering all of the evidence, I find that EAC was aware that the Complainant reported his concerns to the FAA at the time he was discharged on July 18, 2004.[16] Assuming arguendo, that I concluded that EAC officials did not know that the Complainant actually contacted the FAA, those officials clearly knew that the Complainant intended to contact the FAA when they received the Farkas memo and before the Complainant's discharge.

K. Adverse Action

The Complainant's employment with EAC was terminated as of July 18, 2004. Termination of employment is adverse action under AIR21. 49 U.S.C. § 42121(a); 29 C.F.R. § 1979.102(b).

[13] While Bishay and Carroll both testified that it was he who made the decision to terminate the Complainant, Carroll later said that Bishay made the final decision to terminate the Complainant. In any event, Carroll and Piasecka were involved in the discussions and weighed in on this decision. Carroll was the one to ultimately carry out the termination by writing and giving the Complainant the termination letter. Therefore, Piasecka and Carroll's knowledge of the protected activity is relevant, as is Bishay's knowledge of the protected activity. In fact, Bishay testified that he made the decision to fire the Complainant on July 14, 2004, but he spoke with both Carroll and Piasecka in making the determination.

[14] Bishay's attempts to assert he did not know whether the Complainant actually reported his concerns to the FAA is not credible. Although Bishay believed that Farkas accurately recorded what the Complainant said in his memo, and he terminated the Complainant based upon allegedly fraudulent statements in the Farkas memo, he refused to accept that the Complainant contacted the FAA even though the Farkas memo states that the Complainant was contacting the FAA with his concerns.

[15] On July 14, Piasecka, along with Carroll, was involved in bringing the Farkas memo to Bishay's attention and in identifying portions of the employee manual the Complainant allegedly violated. Under these circumstances, it is unreasonable to think that Piasecka would not have informed Carroll and Bishay on July 16, 2004 that the FAA was at the facility looking at the plane. Based upon the evidence, I infer that Piaseck informed Bishay and Carroll that the FAA had been at the facility to examine the aircraft the Complainant reported prior to July 18, when the Complainant was terminated.

[16] The Complainant also testified that Burke confirmed the FAA's visit in a telephone call to him, in which Burke indicated that Carroll was aware of the visit. However, I note that the Complainant did not mention a telephone call from Burke when he filed his complaint and the first time the call is mentioned is in his affidavit signed in September 2006, shortly before the hearing. It is not necessary for me to determine whether or not Burke called the Complainant, as I have determined that other evidence supports the finding that EAC officials were aware that the Complainant had reported his concerns to the FAA before his termination.

L. Whether the Protected Activity was a Contributing Factor in the Complainant's Termination

The complainant must prove by a preponderance of the evidence that his protected activity was a "contributing factor" which motivated the employer to take the adverse employment action against him. 49 U.S.C. §§ 42121(a), (b)(2)(B)(iii); 29 C.F.R. § 1979.109(a); *see also Hirst*, ARB Nos. 04-116, 04-160 at 7; *Clark*, ARB No. 04-150 at 11, 12; *Rooks*, ARB No. 04-092 at 5; *Brune*, ARB No. 04-037 at 13.

1. Closeness in Time

"Retaliatory motive may be inferred when an adverse action closely follows protected activity." *Clark*, ARB No. 04-150 at 12, *citing Keener v. Duke Energy Corp.*, ARB No. 04-091, ALJ No. 2003-ERA-12, slip op. at 11 (ARB July 31, 2006) and *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 2000-ERA-31, slip op. at 10 (ARB Sept. 30, 2003). Temporal proximity between the two creates an inference of an illegal motivation, but "is not always dispositive." *Robinson v. NW Airlines, Inc.*, USDOL/OALJ Reporter (PDF), ARB No. 04-041, ALJ No. 2003-AIR-22 at 9 (ARB Nov. 30, 2005), *citing Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ Nos. 1996-ERA-34, 38, slip op. at 6-7 (ARB Mar. 30 2001) and *Svendsen v. Air Methods, Inc.*, ARB No. 903-074, ALJ No. 2002-AIR-16, slip op. at 8 (ARB Aug. 26, 2004); *see also Peck*, ARB No. 02-028 at 16; *Vieques*, 437 F.3d at 109. As a general matter, the ARB has concluded that an adverse action occurring within one year from the date of protected activity provides sufficient temporal proximity to infer that the adverse action was motivated by the protected activity. *See, e.g. Thomas v. Arizona Pub. Serv. Co.*, 89-ERA-19 (Sec'y Sept. 17, 1993) (finding, under the Energy Reorganization Act, 42 U.S.C. § 5831 *et seq.*, that an inference of causation arose where about one year elapsed between the Complainant's protected activity and the adverse personnel action).[17]

In this case, based on the timing of the discharge, approximately two weeks after Complainant reported his concerns to his supervisor, four days after he called Boston MedFlight and the FAA regarding his health concerns, and two days after the FAA visited EAC's facility, it is reasonable to conclude that the Complainant's protected activity – his complaints both internally and to the FAA – were contributing factors in the termination. By July 14, 2004, Carroll knew that the Complainant had been complaining about the condition of N228CC for many days and he intended to complain to the FAA. Bishay was aware on July 14, 2004 that the Complainant intended to report the incident to the FAA from the Farkas memo. By July 16, 2004, Carroll and Bishay knew that the Complainant must have reported the incident to the FAA since the FAA visited EAC. Two days later the Complainant was discharged. The close temporal proximity between the protected activity and the Complainant's termination here certainly creates a powerful inference of illegal motivation.

[17] AIR21 was modeled on the Energy Reorganization Act, 42 U.S.C. § 5851, *et seq*. *See Peck*, ARB No. 02-028 at 9.

2. EAC's Showing of a Legitimate, Nondiscriminatory Reason for the Complainant's Termination

The legitimacy of an employer's articulated reason for the discharge is a factor to be examined in the course of determining whether a complainant has proven by a preponderance of the evidence that protected activity contributed to the termination. EAC can rebut the Complainant's showing that the protected activity was a contributing factor in his termination by producing evidence that the termination was motivated by a legitimate, nondiscriminatory reason. *See Brune*, ARB No. 04-037 at 14. In the present case, EAC contends that the sole reason the Complainant was terminated was due to his improper contact with Boston MedFlight and the fraudulent comments he made which were reflected in the Farkas memo. Resp't Br. at 2, 6. EAC contends that the Complainant's acts were a malicious interference with a contractual relationship between EAC and its biggest client, Boston MedFlight. Resp't Br. at 7. EAC argues that the fraudulent statements the Complainant made violated EAC's employee manual. Resp't Br. at 5, 7. The Complainant argues that the evidence indicates that he did not make any fraudulent statements to Farkas and did not violate the employee manual. Cmp. Br. at 13; TR 171.

Carroll and Bishay testified that the Complainant was discharged for making fraudulent or false statements to EAC's customer, as set forth in the Farkas memo, and such action violated the company employee manual. Both testified that the allegedly fraudulent statements were all contained in the Farkas memo. They also stated that the sentence in the termination letter, "This action is a result of your actions not in compliance with the Eastern Air – Company Manual concerning fraudulent statements to our customers and others," accurately sets forth the reasons the Complainant was terminated. TR 218, 439; CX-6.

EAC asserts that the first fraudulent statement was that the Complainant "inquired if we were aware that EAC had received some 'fines.'" Resp't Br. at 6, 8. The Complainant argues that he never told Farkas that EAC had received fines. Cmp. Br. at 13. Rather, the Complainant told Farkas that he was going to the FAA and EAC could receive fines. (emphasis added). The Complainant's testimony in this regard is corroborated by Farkas who stated that he understood that the Complainant had brought his concerns to the FAA's attention and he felt that EAC was going to receive fines. Upon consideration of the evidence, I find the Complainant's statement to Farkas that he thought EAC could or was going to receive fines as a result of his complaints is not the same as saying the company had received fines and was a statement of his opinion and is not a fraudulent or false statement.

The second fraudulent statement that Bishay and Carroll relied upon to terminate the Complainant was the phrase "? Had hepatitis."[18] Bishay's testimony in this regard was inconsistent. He initially said that this phrase meant that the Complainant told Farkas the patient had hepatitis. TR 387 Later he acknowledged that he understood the statement to mean that the Complainant was putting doubts in Farkas' mind as to whether the liver transplant patient had hepatitis. TR 416. Carroll testified that he did not know what Farkas meant when he wrote this

[18] The Respondent does not discuss this alleged "fraudulent statement" in its post-hearing brief.

statement, and he did not call Farkas to clarify. The Complainant is not a physician. Read in context, the phrase "? Had hepatitis" can reasonably be construed only to mean that the Complainant was raising a question as to whether or not the liver transplant patient, the source of the waste he cleaned, had hepatitis. Questioning whether the patient had hepatitis is not a fraudulent statement. The Complainant was raising a legitimate health and safety concern, and as such this phrase cannot serve as a non-discriminatory business reason for the discharge.

The third fraudulent statement that Bishay and Carroll point to was the statement in the Farkas memo that "line staff had no specific training on cleaning up this type of mess."[19] Carroll's testimony that this statement was fraudulent because he did not know if the Complainant was referring to a mess from cups, papers, and the normal debris from a flight is absurd. Carroll conceded that the line staff did not have any training in cleaning up urination. When Carroll read "this type of mess" in the Farkas memo, he claimed he did not understand that the Complainant was referring to the urination. Carroll's testimony is simply not credible. The phrase "this type of mess" appears at the end of a sentence in which the Complainant told Farkas that the patient had urinated in N228CC, and thus, I find that the only logical and reasonable conclusion is that the Complainant was referring to urine as the "type of mess" he was not trained to clean. Bishay's testimony on this point is equally unpersuasive. Bishay stated that the Complainant had training for basic cleaning of an aircraft, and Bishay's understanding of the mess at the time of the incident is that somebody either spit, urinated, or vomited on board the aircraft. Bishay testified that it is common to find human fluids in the trash basket of an aircraft. Bishay said he knows the Complainant was trained to clean the interior of an aircraft which includes napkins, Kleenex, and paper towels and these cleanings include human fluids. Bishay said that he was not aware of whether the Complainant had any training prior to July 4, 2004, in the proper handling or clean-up of biohazards or bloodborne pathogens. In light of Bishay's acknowledgement, he has no basis for concluding that the Farkas' memo's statement regarding lack of training for "this type of mess" was fraudulent.

Bishay testified that another fraudulent statement was "that EAC was doing airmedical mission through their charter operations." Resp't Br. at 7. However, Bishay did not check with Farkas or the Complainant to see if this is actually what the Complainant said. Furthermore, the Complainant testified that he just asked Farkas if he was aware of a patient on the aircraft and he did not use the term "airmedical missions." I find the Complainant's testimony on this matter credible. Therefore, I conclude that the Complainant did not make any fraudulent statements in the Farkas memo.

Furthermore, Carroll and Bishay testified that the false or fraudulent statements in the Farkas memo violated several sections of the employee manual warranting the Complainant's dismissal. When asked to identify the specific provisions of the employee manual the Complainant violated, Carroll identified three sections.[20] First, Carroll stated the Complainant violated number 2 of the employee manual, titled "Dishonesty or misrepresentation to Eastern Air Certain, Inc. or a customer." *See* RX-6. For the reasons discussed above, the Complainant's

[19] The Respondent does not discuss this alleged "fraudulent statement" in its post-hearing brief.

[20] Bishay admitted that Carroll and Piasecka circled three provisions of the employee manual in response to his request that they review the manual and discuss the provisions with him in light of the Farkas memo.

statements were neither dishonest nor a misrepresentation. Carroll also said that based upon the Farkas memo the Complainant violated number 15, which is titled "Slandering, making false or malicious statements concerning any employee or the Company, its products, its service, or customers and/or their products." As discussed above, the statements attributed to the Complainant in the Farkas memo simply raised questions and concerns regarding his possible exposure to infectious disease and did not make false statements about EAC. On the contrary, the Complainant had a legitimate safety and health concern which was not being addressed by EAC, and he called Boston MedFlight to see if it would be addressing his safety concerns, by cleaning the aircraft.

In addition to the three circled sections of the employee manual relied upon by Carroll, Bishay considered other provisions of the employee manual, namely number 6, "Willful interference with Company operations," number 10, "Failure to comply with Company rules regarding personal appearance and conduct.," and number 20, "Involving Eastern Air Center, Inc. in any act that damages the Company's reputation or good will." Bishay said these provisions were applicable because he believed that the Complainant had no authority to contact Boston MedFlight, and by doing so the Complainant interfered with an advantageous relationship between EAC and its customer. The Complainant did not interfere with EAC's relationship with Boston MedFlight. He was told by his direct supervisor that Boston MedFlight would come and clean the N228CC aircraft. Thus, the Complainant understood that Boston MedFlight had already been contacted about the situation with the aircraft. Moreover, Boston MedFlight's Farkas specifically testified that the Complainant's call did not raise any concerns for Boston MedFlight in regards to safety operations at EAC, and it did not place EAC's relationship with Boston MedFlight in jeopardy. Farkas stated that Boston MedFlight later elected not to renew its contract with EAC when it expired in 2006 because EAC had a "rotating door administration and operational people, and no clear ownership of the company…" TR. 37-38. Therefore, any damage caused to the business relationship between EAC and Boston Med Flight resulted from EAC's own practices or actions and not from the Complainant's call to Boston MedFlight.

In addition, I note that while Bishay and Carroll relied on one portion of the employee manual in making their decision to terminate the Complainant, they disregarded the "Discharge" section which states, "If your performance is unsatisfactory, due to lack of ability or failure to fulfill the requirements of your job, you will be notified of the problem and your supervisor will work with you to correct the situation. If this does not succeed, you will be given notice prior to termination." EAC failed to follow its own employee manual with respect to the Complainant's discharge. The Complainant was never notified there was a problem prior to his termination. Bishay's self-serving statement that EAC did not comply with its employee manual and afford the Complainant an opportunity to cure any work issue because he decided the Complainant's problem "could not be corrected" is entitled to little weight. TR 447.

The evidence of record demonstrates that the Complainant did not make any false or fraudulent statements to Farkas, nor did he violate the provisions of the employee manual. The Complainant's call to Boston MedFlight did not damage or interfere with EAC's relationship with Boston MedFlight. Accordingly, I find that EAC failed to provide a legitimate, non-

discriminatory reason for the Complainant's termination and the articulated reasons for the discharge are merely pretext.

M. Whether EAC Would Have Taken the Same Adverse Action in the Absence of the Protected Activity

Since the Complainant has proven by a preponderance of the evidence that his protected activity was a contributing factor in the adverse employment decision, he has shown a violation of AIR21, and the burden now shifts to EAC. EAC may avoid liability if it demonstrates by clear and convincing evidence that it would have taken the same adverse action in any event. 49 U.S.C. § 42121(b)(2)(B)(iv); 29 C.F.R. § 1979.109(a).

EAC argues that even if the Complainant had engaged in protected activity by reporting potential FAA violations to EAC and the FAA, he nonetheless would have been terminated for his improper communication with Boston MedFlight, EAC's largest customer. Rsp't. Br. at 2, 7. However, as discussed previously, the Complainant believed Boston MedFlight was aware of the issue with the aircraft when he contacted them and Boston MedFlight's Farkas stated that the Complainant's call did not damage EAC's relationship with Boston MedFlight.

Carroll and Bishay testified that the Complainant was out to harm EAC's reputation by badmouthing the company to its biggest customer, Boston MedFlight. However, Farkas testified that the Complainant's call did not hurt the relationship between EAC and Boston MedFlight. EAC did not speak with Farkas regarding any concerns Boston MedFlight might have had in response to Complainant's call, before it terminated the Complainant. EAC's failure to investigate any alleged damage to its business relationship with Boston MedFlight in July of 2004 undermines EAC's assertion that it would have fired the Complainant, even in the absence of his protected activity. One would expect that a company concerned with damage to a business relationship, would discuss the issue with the business customer and attempt to address or mitigate any actual damage to the working relationship. EAC took no such action. In the absence of any investigation of damage to its business relationship at the time of the Complainant's call to EAC, and Farkas' testimony that Florek's call did not damage Boston MedFlight's relationship with EAC, this purported basis for the termination is simply not credible.[21] Therefore, I conclude that EAC would not have terminated the Complainant in the absence of the protected activity.

The Complainant also argues that the timing of his discharge contradicts EAC's position. Cmp. Br. at 14. Farkas telephoned Piasecka at 10:50 a.m. on July 14, 2004, and informed him of the Complainant's call, and faxed him the Farkas memo in the early afternoon the same day. However, Bishay testified that he was not advised of the matter until the "late afternoon" of July 14, 2004. As a result, according to Bishay his decision to terminate the Complainant was made after the Complainant left EAC for the day. The Complainant argues that the significant delay between Piasecka's discovery of the issue and his presentation of the issue to Bishay, if believed, contradicts EAC's position that the Complainant's actions were so serious as to require discharge "at once." Cmp. Br. at 15. The Complainant was not terminated "at once." Although Piasecka

[21] EAC did not offer evidence of disciplinary actions the company has taken against other employees for similar or comparable "misconduct."

knew of the issue at 10:50 a.m., and the Complainant remained at EAC until 4:20 p.m., the Complainant was not terminated or otherwise confronted by EAC personnel on July 14, 2004. No one from EAC contacted the Complainant concerning the issue until he was terminated on July 18, 2004, two days after the FAA visited EAC. The Complainant argues that it is simply not believable that EAC would consider the matter so important as to require termination without any investigation, but would not terminate the Complainant's employment for four more days. Cmp. Br. at 15. I find the Complainant's argument persuasive. EAC has presented no evidence to show that it would have terminated the Complainant in the absence of the protected activity.

N. Remedies

The Complainant seeks reinstatement, back pay, and attorney fees. EAC argues that even if the Complainant was terminated as a result of his protected activity, he has no damage claim. Resp't Br. at 10. 29 C.F.R. §1979.109(b) provides:

> If the administrative law judge concludes that the party charged has violated [AIR21], the order shall direct the party charged to take appropriate affirmative action to abate the violation, including, where appropriate, reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. At the request of the complainant, the administrative law judge shall assess against the named person all costs and expenses (including attorney's and expert witness fees) reasonably incurred. If, upon the request of the named person, the administrative law judge determines that a complaint was frivolous or was brought in bad faith, the judge may award to the named person a reasonable attorney's fee, not exceeding $ 1,000.

*See also* 49 U.S.C. § 42121(b)(3)(B).

1. Reinstatement

The Complainant requests reinstatement and restoration of all of the terms, conditions, and privileges associated with his position with EAC. Cmp. Br. at 16. EAC violated AIR21, and therefore the Complainant is entitled to immediate reinstatement to his former position as line crewman at EAC. *See* 49 U.S.C. § 42121(b)(3)(B); 29 C.F.R. § 1979.109(b).

2. Back Pay

EAC contends Complainant is not entitled to back pay. EAC maintains that once the Complainant exhausted his unemployment benefits, he accepted full-time employment with General Safety Services and he voluntarily quit this job. *Id.* The Complainant seeks back pay for the time he was unemployed. Cmp. Br. at 9. The Complainant testified that he was paid $10 per hour, working 40 hours per week at EAC for a weekly income of $400. *Id*. After his

termination, the Complainant received unemployment compensation in the amount of $6,502 from July 18, 2004 through January 29, 2005. He earned gross income of $7,693 with General Safety Services. The Complainant calculated his back pay by multiplying $400 per week by 137 weeks, the number of weeks he had been unemployed at the date of the hearing, and subtracting the unemployment benefits and the amount the Complainant was paid by General Safety Services for a back pay award of $40,605.00. *Id.*

While I find that the Complainant has proven by a preponderance of the evidence that EAC violated AIR21, the evidence establishes that the Complainant has failed to mitigate his damages. The Complainant testified that from 2000 until he began work with EAC in September of 2003, he had approximately ten jobs. Immediately following his termination from EAC, he received unemployment compensation benefits. The Complainant looked for other employment by calling various heavy equipment companies and welding jobs and reading the classified and help wanted sections of the newspaper every day. As a result, the Complainant was hired by General Safety Services in Dedham, Massachusetts in January of 2005, and he began to work for them in March of 2005. He said was paid $16.50 per hour and worked 40 hours per week. The Complainant alleged he left General Safety Services voluntarily in May of 2005 because of safety issues. However, I credit the testimony of Nadine Bellew, president of General Safety Services, that the Complainant did not report safety concerns to her and she was unaware of his reporting any such concerns. This was the last company the Complainant worked for.

In explaining why he has not been employed since he voluntarily left his job with General Safety Services, the Complainant stated he has been offered positions but some did not have health benefits and others were jobs where he would be paid "under the table." TR 116-118. The Complainant said "I can't take that kind of work, where some of those have been offered to me. I can't go there." TR 117. The Complainant said he could not take jobs that paid in cash because he would have to show where his money is coming from as he has children to support. The Complainant said he believes he is having a hard time finding employment because he has to put on his employment applications that he was terminated from EAC for calling OSHA. When asked how he is currently supporting himself, the Complainant said he is living with his girlfriend.

I do not find it credible that the Complainant has been unable to secure employment since he left General Safety Services. The Complainant's testimony that he was offered jobs but he does not want to take a position where he would be paid under the table, because he could not show where his income was generated, is nonsense. There is no reason the Complainant could not have accepted a job paying cash and then paid the taxes due himself. Given the option of making no income or making some income under the table, the Complainant's explanation for his failure to obtain employment after he left General Safety Services is neither rational nor credible. The Complainant has a duty to mitigate damages, and he has not done so.

Therefore, the Complainant is entitled to back pay from the day he was terminated from EAC until his first day of employment at General Safety Services. The Complainant was terminated from EAC on July 18, 2004, and he began to work for General Safety Services on March 18, 2005. Thus, the Complainant was out of work for 35 weeks. The Complainant was paid $10 per hour and worked approximately 40 hours per week at EAC. He is entitled to back

pay in the amount of $14,000, offset by the unemployment compensation in the amount of $6,502, for a total back pay award of $7,498. *See* 49 U.S.C. § 42121(b)(3)(B); 29 C.F.R. §979.109(b).

3. Complainant's Attorney's Fees and Costs

If the OALJ finds that an employer violated AIR21, it "can assess, at the complainant's request, the costs of bringing the case, including attorney's fees reasonably incurred by the complainant in bringing the complaint, against the person against whom an order is issued for the violation of AIR21." *Negron v. Vieques Air Link, Inc.*, USDOL/OALJ Reporter (PDF) ARB No. 04-021, ALJ No. 2003-AIR-10, slip op. at 2 (ARB Mar. 7, 2006), *citing* 49 U.S.C. § 42121(b)(3)(B); 29 C.F.R. § 1979.109(b). In order to calculate attorney's fees, the beginning point of analysis is to multiply the number of hours reasonably expended in bringing the litigation by a reasonable hourly rate. *Negron*, ARB No. 04-021, slip op. at 2, *citing Jackson v. Butler & Co.*, ARB Nos. 03-116, 03-144, ALJ No. 2003-STA-26, (ARB Aug. 31, 2004); *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-19 (ARB Feb. 6, 2004). "The party seeking a fee award must submit evidence documenting the hours worked and the rates claimed. If the documentation of hours is inadequate, the award may be reduced accordingly." *Negron*, ARB No. 04-021, slip op. at 2, *citing Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983) "The petitioner bears the burden of proof that claimed hours of compensation are adequately demonstrated and reasonably expended." *Jackson*, ARB Nos. 03-116, 03-144, slip op. at 10 (citations omitted). "Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary. . . ." *Hensley*, 461 U.S. at 434. . "The amount of the fee . . . must be determined on the facts of each case." *Id.* at 429.

Twelve factors are considered in determining attorney's fees. *See Hensley*, 461 U.S. at 429-430 These twelve factors include:

> (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the "undesirability" of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases.

*Id.* at 430 n.3, *citing Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-719 (5th Cir. 1974). The Supreme Court has stated that the district court may reduce the award for inadequately documented hours, or for hours that were not "reasonably expended" due to overstaffing or inexperience. As in private practice, "[h]ours that are not properly billed to one's *client* are not properly billed to one's *adversary* pursuant to statutory authority." *Hensley*, 461 U.S. at 434 (emphasis in original).

The Complainant seeks attorney's fees and litigation costs. In this matter, the Complainant has been represented by two law firms, Joseph & Herzfeld of New York, and Pierce & Mandell, P.C. of Boston. Cmp. Br. at 9.[22] As set forth in the Affidavit of Thomas E. Kenney ("Kenney Aff."), Kenney of Pierce & Mandell has served as lead counsel in this matter and has spent a total of 143.0 hours representing the Complainant. *Id.*; Kenney Aff. at 1. Kenney is a shareholder of Pierce & Mandell, P.C., and he has been practicing in the civil litigation field since 1992. Kenney Aff. at 1. Kenney's affidavit states that he met with the Complainant and reviewed the relevant documents, participated in the court's pre-hearing conference, served discovery requests upon the Respondent, reviewed the Respondent's responses, and worked with the Complainant in responding to the Respondent's requests for documents. Cmp. Br. at 9; Kenney Aff. at 1. In addition, Kenney has prepared for and taken the depositions of the Respondent and Farkas, and has prepared the Complainant for deposition and defended his deposition. Cmp. Br. at 9-10; Kenney Aff. at 1-2. Kenney prepared an opposition to the Respondent's motion for summary judgment. Cmp. Br. at 10; Kenney Aff. at 2. The hearing in this matter lasted one and one-half days. *Id.* Kenney spent three full days preparing for the hearing, including preparing the Complainant for his testimony and preparing examinations for the five other witnesses that testified during the hearing. *Id* Kenney reviewed the 455 page transcript as well as the numerous exhibits introduced at the hearing. *Id.* Kenney also reviewed the relevant case law concerning claims under the statute, and prepared the rather extensive post-hearing brief filed by the Complainant. Based on the foregoing, and the fact that this litigation was contentious and heavily litigated, Kenney seeks compensation for a total of 143.0 hours spent on this matter. *Id.* Kenney states that his hourly rate is $300 and he believes this rate is below the usual and customary rate charged by attorneys with his experience for matters of this type in Boston. *Id.* Based on the seriousness of the claims and the complexity of the issues, the Complainant argues that $300 per hour is a reasonable rate for Kenney's services. *Id.* Thus, the Complainant seeks attorney fees totaling $42,900 for work performed by Attorney Kenny. *Id.*

The firm of Joseph & Herzfeld also provided services to the Complainant in this matter. As set forth in the Affidavit of Soline McLain ("McLain Aff."), two attorneys and a legal assistant from Joseph & Herzfeld worked on this claim. Cmp. Br. at 10; *see* McLain Aff. Ms. McLain's affidavit states that Charles Joseph is a partner in the firm, and he has been practicing in the civil litigation field for 16 years. McLain Aff. at 1. He spent a total of 3.5 hours speaking with the Complainant and the Respondent's representatives, researching the applicable law, and preparing a demand letter to the Respondent. *Id.* Joseph's standard rate for this matter is $425 per hour, which McLain understands to be at or below the usual and customary rate charged by attorneys with Joseph's experience for matters of this type in New York city. McLain Aff. at 1-2. Thus, the value of Joseph's services in this matter is $1,487.50. McLain Aff. at 2.

Rebecca Height, an associate at Joseph & Herzfeld, has four and one half years of civil litigation experience. *Id.* She has spent a total of 21 hours on this case performing the following: multiple conversations with the Complainant, review of the relevant documents, research regarding the applicable legal standards, making FOIA requests and reviewing the documents produced, reviewing the Secretary of Labor's findings and preparing and filing the appeal, and conversing with representatives of OSHA concerning its investigation. *Id.* Height's

[22] The Complainant's counsels have submitted their attorney fee request in the form of affidavits.

standard hourly rate is $250 per hour, which McLain understands to be at or below the usual and customary rate charged by attorneys with Height's experience for matters of this type in New York City. The Complainant seeks $5,250 for Attorney Height's services. *Id.*

McLain has been a legal assistant for two and one half years, and she is a 2002 graduate of Columbia University. *Id.* She has spent a total of 31.5 hours on this matter, including reviewing the relevant documents, assisting in the preparation of the pre-hearing statement, assisting in the preparation of the opposition to the Respondent's motion for summary judgment, and assisting in preparation for the hearing and attendance at the first day of the hearing. *Id.* McLain's standard rate is $95 per hour, which she understands to be at or below the usual and customary rate charged by legal assistants with her experience for matters of this type in New York City. McLain Aff. at 2-3. Thus the value of her services in this matter is $2,992.50. McLain Aff. at 3.

These three professionals spent a total of 56 hours in this matter, and their standard hourly rates for this matter ranged from $95 per hour to $425 per hour. Thus, the Complainant argues that the reasonable value of the services provided by the three Joseph & Herzfeld professionals totaled $9,730. *Id.*

In addition, the Complainant and his counsel have incurred $2,767.76 in litigation costs. Cmp. Br. at 10; Kenney Aff. at 2. The Complainant argues that all of these costs were necessary for the Complainant's prosecution of his claim in this action. Cmp. Br. at 11; Kenney Aff. at 2. Thus, the Complainant seeks a total of $52,630.00 in attorney fees and $2,767,76 in litigation costs. Accordingly, the Complainant asks that the court award him $55,397.76 in attorneys' fees and litigation costs. Cmp. Br. at 16.

The Respondent objects to the Complainant's request for attorneys' fees and costs. Resp't Supplemental Post-Hearing Br. at 1. The Respondent argues that the Complainant failed to muster a claim upon which monetary relief can be granted; it also argues that the Complainant failed to conform to the standards mandated by United States courts respecting the submission of attorneys' fee petitions. Resp't Supplemental Post-Hearing Br. at 2. The Respondent argues that the Complainant failed to: (1) provide the required details respecting each time entry; (2) list each task performed in relation with the time entry; (3) identify the specific claim on which time was allegedly spent; (4) identify the time spent on each task relative to the specific claim which has not either been withdrawn by the Complainant or dismissed by the court; (5) keep contemporaneous records of the time purportedly spent on each task and each remaining claim; (6) provide a narrative of each attorney's length of experience and expertise in the specific area of practice; (7) provide the hourly rate for each attorney; and (8) correlate each entry with the respective task and the remaining claim.[23] *Id.*

[23] The Respondent argues that the Complainant has the burden to demonstrate compliance with the rules. Resp't Supplemental Post-Hearing Br. at 2. It claims that the Complainant must show that his attorneys did not engage in: (1) bogus time entries; (2) entries that are repeated verbatim; (3) fail to maintain contemporaneous records; (4) fail to maintain adequate entries; (5) record unnecessary and uncompressible time entries; (6) record excessive hours and/or fees for individual tasks; or (7) record excessive fees in the aggregate in light of the claims at issue. Resp't Supplemental Post-Hearing Br. at 2-3.

Contrary to the Respondent's assertions, the Complainant's attorney fee request and supporting affidavits does provide an hourly rate for each attorney and legal assistant, and the narrative of each attorney and legal assistant's length of experience and expertise in civil litigation is sufficient. However, the Respondent correctly contends that the Complainant failed to provide an itemized list of the date, time and duration necessary to accomplish each of the specific tasks performed. Rather, the Kenney affidavit described in general terms what he did to prepare for litigation. However, Kenney's affidavit failed to provide an itemized list of date, time billed and the specific task for which payment is sought. This failure makes it difficult for EAC to oppose a specific tasks or the time spent on a task, because an itemized list of time billed on the matter has not been provided. I must therefore attempt to decide what is an objectively reasonable amount of time spent performing each task identified in the affidavits.

Kenney met with the Complainant and reviewed the relevant documents, participated in the court's pre-hearing conference, served discovery requests upon the Respondent, reviewed the Respondent's responses, and worked with the Complainant in responding to the Respondent's requests for documents. I find that one day, or eight (8) hours, is a reasonable amount of time to spend on those tasks.

In addition, Kenney has prepared for and taken the depositions of the Respondent and Farkas, and has prepared the Complainant for deposition and defended his deposition. I find that two days, or 16 hours, is a reasonable amount of time to spend preparing for and attending the depositions. Kenney prepared an opposition to the Respondent's motion for summary judgment. Based on the length and substance of the opposition to the Respondent's motion for summary judgment, I find that four (4) hours is a reasonable amount of time to spend on that task. Kenney attests he spent three full days preparing for the hearing, including preparing the Complainant for his testimony and preparing examinations for the five other witnesses that testified during the hearing. I find three days, or 24 hours, to be a reasonable amount of time preparing for the hearing. The hearing in this matter lasted one and one-half days, or 12 hours, and I will award attorney's fees for the hearing. Kenney prepared a post-hearing brief for the Complainant, however, the brief was essentially an expansion of the Complainant's response to summary decision and cited a total of two cases as legal authority supporting his claim. Considering the quality of the brief Complainant submitted, I find that 12 hours, is a reasonable amount of time to spend on the post-hearing brief.

Therefore, I find that 76.0 hours is a reasonable amount of time for Kenney to spend on this litigation. I also find that Kenney's standard rate of $300 per hour is a reasonable hourly rate for an attorney with Kenney's experience for a matter of this type in Boston. Thus, the value of Kenney's services in this matter is $22,800.

As set forth in the affidavit of McLain, two attorneys and a legal assistant from Joseph & Herzfeld provided services to the Complainant in this matter. I will not award attorney's fees to Joseph or Height. Neither attorney has provided documents reflecting the precise task performed, the date performed and the time spent, nor have either of the two attorneys provided

an affidavit or any other evidence documenting the hours worked and the rates claimed.[24] An affidavit from their legal assistant is not sufficient.

McLain represented that she spent a total of 31.5 hours on this matter, including reviewing the relevant documents, assisting in the preparation of the pre-hearing statement, assisting in the preparation of the opposition to the Respondent's motion for summary judgment, and assisting in preparation for the hearing and attendance at the first day of the hearing. I will not award fees for McLain's attendance at the first day of the hearing. The number of exhibits was not voluminous, there were a total of six witnesses and, there were no unusual issues that might warrant having a paralegal attend the hearing along with counsel. Furthermore, Kenney filed the opposition to the Respondent's motion for summary judgment. Based on the length and substance of the opposition to the Respondent's motion for summary judgment, I will not award any time to McLain for this task.

Therefore, I find that three (3) hours is a reasonable amount of time for McLain to spend on this litigation. I also find that McLain's standard rate of $95.00 per hour is a reasonable hourly rate for a legal assistant with McLain's experience for a matter of this type in New York city. Thus, the value of her services in this matter is $285.

In addition, the Complainant and his counsel have incurred $2,767.76 in litigation costs. I agree that the costs incurred for the deposition subpoena of Farkas, the transcripts of the depositions of the Respondent, the Complainant, and Farkas, the hearing subpoenas for Farkas and Carroll, and the transcript of the hearing are all necessary costs for the Complainant's prosecution of his claim in this action. Thus, I find that $2,767.76 in litigation costs is reasonable.

Accordingly, the Complainant is entitled to attorney fees and costs in the amount of $25,852.76.[25]

## IV. ORDER

Based upon the foregoing findings of fact and conclusions of law, the following order is entered:

(1) EAC shall reinstate the Complainant to his former position of line crewman;

[24] In addition, no evidence was presented showing the hourly fee charged by Mr. Joseph is the customary rate charged for such services in New York City.

[25] The Respondent argues that the Complainant's claim was asserted in bad faith and should be deemed frivolous. Resp't Supplemental Post-Hearing Br. at 1. If a complaint "is frivolous or has been brought in bad faith," a prevailing employer may be awarded a reasonable attorney's fee not exceeding $1,000. 49 U.S.C. § 42121(b)(3)(c); 29 C.F.R. § 1979.109(b). As I have found the Complainant has successfully established a claim of unlawful termination, the claim was not frivolous or brought in bad faith. EAC is not entitled to attorney fees.

(2) EAC shall pay the Complainant back pay in the amount of $7,498; and

(3) EAC shall pay the Complainant $25,852.76 in attorney fees and costs.

**SO ORDERED.**

A

**COLLEEN A. GERAGHTY**
Administrative Law Judge

Boston, Massachusetts

**NOTICE OF APPEAL RIGHTS**: To appeal, you must file a Petition for Review ("Petition") with the Administrative Review Board ("Board") within ten (10) business days of the date of issuance of the administrative law judge's decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Room S-4309, 200 Constitution Avenue, NW, Washington DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; but if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *See* 29 C.F.R. § 1979.110(a). Your Petition must specifically identify the findings, conclusions or orders to which you object. You waive any objections you do not raise specifically. *See* 29 C.F.R. § 1979.110(a).

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. You must also serve the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, Washington, DC 20210. *See* 29 C.F.R. § 1979.110(a).

If no Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 1979.110. Even if a Petition is timely filed, the administrative law judge's decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days of the date the Petition is filed notifying the parties that it has accepted the case for review. *See* 29 C.F.R. §§ 1979.109(c) and 1979.110(a) and (b).

**The preliminary order of reinstatement is effective immediately upon receipt of the decision by the Respondent and is not stayed by the filing of a petition for review by the Administrative Review Board.** 29 C.F.R. § 1979.109(c). If a case is accepted for review, the decision of the administrative law judge is inoperative unless and until the Board issues an order adopting the decision, except that a preliminary order of reinstatement shall be effective while review is conducted by the Board. 29 C.F.R. § 1979.110(b).